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LIENS IN AIRCRAFT: PRIORITIES

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This paper recently brought to its author the second annual Braniff Essay Award in Aviation Law, an award established in memory of the late Thomas E. Braniff, airline pioneer, by Roger J. Whiteford and Hubert A. Schneider of the law firm of Whiteford, Hart, Carmody and Wilson, Washington, D. C.

UNLIKE the relatively settled subject of priority among maritime liens, the seniority *inter se* of liens and other security interests in aircraft is a subject fraught with uncertainty. Modern federal legislation protecting the interests of secured creditors has to a limited extent brought clarity to the aircraft priority question, but the comparative plethora of judicial interpretation upon the relation of this legislation to state statutes and previously existing precedents leaves numerous problems either unanswered or untouched. Legal commentators and judges have evinced considerable reluctance to state principles more broadly than precisely necessary to decide a particular case—in rather remarkable contrast to their brethren in admiralty, who in the past thirty years through general dicta or definitive writing have attempted, with at least partial success, to reconcile conflicting decisions and theories into a workable system of priority law.

The author is not so presumptuous as to suggest this article as a definitive work upon the subject of priority of liens in aircraft. Neither his experience nor the state of the law permits such an attempt. The purpose here is rather primarily to collect statutory material and judicial precedent specifically concerning aircraft lien priorities. An effort will be made to examine the theoretical basis for present ideas on priority and to a limited degree, reconciliation and interpretation of the decisions, together with suggestions for improvements in the law, will be undertaken. It is hoped, then, that with this material as one starting point, aviation law practitioners may be able to press the evolution, in courts and legislatures, of a more certain system of priorities for aircraft liens.

The Competing Analogies

The history of the aircraft lien is necessarily a short one. Because this is so, aircraft priority doctrines have been drawn—often unconsciously—from two traditional sources of priority law: the common law and the maritime law. While it is not feasible to depict either source in more than general terms, definition of a few first principles in both systems is warranted in understanding modern aircraft lien statutes and decisions.

1. *Common law.* Although undermined by myriad exceptions and ignored frequently in statutory priority schemes, the ancient time-sequence maxim *qui prior est tempore potior est jure* is still the basic axiom of common law lien priority. Absent contrary statute, two liens of the same nature created one before the other will be assigned rank upon the basis that "he who is prior in time is prior in right."[1] But this exact factual situation seldom occcurs today—liens are most often created and given priority by statute or contract exclusive of common law principles.[2]

Also found at common law is the traditional deference paid to the "common law" lien belonging to the artisan, which has often been termed prior in right to all others, including antecedent statutory liens.[3] Lip service is given to this principle even today, but many statutes—such as recording acts—have changed this result in the perennial contest between recording mortgagee and a subsequent repairman.[4] Those statutes which give preference to the latter do so most often upon the theory of implied consent of the owner of the security interest rather than because of the innate superiority of the common law lien.[5]

There is little to be gained here from a detailed study of the federal and state statutory schemes which have modified the common law. Suffice it to say that in determining priority among liens in aircraft, a court might look to the common law for two ancient principles: the time-right doctrine, and the generally-recognized superior position of the common law lien. That it will not apply them because of contrary statutory mandate will often be the case, but on the other hand, priority legislation with respect to the aircraft is infrequent and incomplete, so that resort to these or other principles outside the statute may well be necessary.

2. *Maritime law.* In direct contrast with the common law time-right

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[1] See e.g. Portneuf-March Valley Canal Co. v. Brown, 274 U.S. 630 (1927); U.S. v. Gilbert Associates, Inc., 345 U.S. 361 (1953). See generally *IV American Law of Property*, §§ 17.1-17.3 (1952).

[2] *IV American Law of Property*, § 16.106F (1952); *Brown, Personal Property* (2nd ed.) § 112 (1936).

[3] See e.g. Whitefield Village Fire Dist. v. Bobst, 93 N.H. 229, 39 A. (2d) 566 (1944); Sullivan v. Clifton, 55 N.J.L. 324, 26 A. 964 (1893); Shaw v. Webb, 131 Tenn. 173, 174 S.W. 273 (1914).

[4] See *Brown, Personal Property* (2nd ed.) § 112 (1936).

[5] "It will be noticed that the basis of the implied authority in the mortgagor to contract for repairs is in part the fact that the mortgagor depended on the operation of the vessel to secure him funds to retire the mortgage which existed thereon. This circumstance has been fixed upon by several later courts to work out an authority in the vendee or mortgagee in possession to contract for repairs on the encumbered chattel and to submit the same to the lien of the party making them. Other cases preferring the lien of the mechanic to that of the prior mortgage or conditional sale have, however, generally not considered this element as important, so that even without it an implied authority to contract for repairs is found to exist. It is said that the vendor or mortgagee expects and intends that his debtor shall keep the encumbered chattel in his possession. If as is frequently the case, such chattel is an automobile or other vehicle, it is known that in its operation it will require repairs. Such repairs will be of benefit both to the lien creditor in protecting his security, and to the lien debtor in enabling him to continue to enjoy possession. Consent to the contracting for such repairs is therefor implied." *Brown, Personal Property* § 112 (1935).

rule, priority among maritime liens is traditionally determined in the inverse order of time of accrual, so that theoretically at least, the most recent lien takes precedence over all earlier liens.[6] Two justifications are offered for the doctrine: (1) each lienor performing services for the vessel becomes a part owner of the vessel (not unlike the common law lienor), and as such, faces the possibility that "his" vessel may become subject to further liens as the voyage continues; and (2) the last lienor, in performing services for the vessel, permits it to continue on its voyage, thereby benefiting all previous lienors and therefore deserving seniority in right.[7] Although both of these theories are subject to severe question,[8] there is no doubt that inverse priority continues to be a basic tenet of the maritime scheme. It has been subverted to the extent that many admiralty courts will now select a convenient period of time—a voyage, ninety days, or a calendar year—and declare that all liens accruing within that period are of equal priority among themselves, time-wise.[9] Time is then significant only in the ranking of liens accruing on independent succeeding voyages or periods, between which the inverse time priority principle still prevails.

Superimposed upon this system, however, is the more significant ranking of maritime liens by class[10]—a priority scheme which becomes all-important when the competing liens all arise within a single period of computation. A highly acceptable statement of the modern view of this class-ranking, approved by commentators and generally borne out by the decisions, is the *dictum* found in *The William Leishear*:

> ". . . to-day it is possible to deduce, from the decisions, the following order of priority, existing irrespective of time, which represents the weight of authority: (1) Seaman's wages; (2) salvage; (3) tort and collision liens; (4) repairs, supplies, towage, wharfage, pilotage, and other necessaries; . . . (6) non-maritime claims."[11]

To this list must be added the "preferred mortgage" obtained pursuant to the Ship Mortgage Act of 1920.[12] This mortgage, if properly drawn

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[6] The St. Jago de Cuba, 22 U.S. 409 (1824); The Eugenia Emilia, (D.C. Mass. 1924) 298 F. 340. See generally, Connor, "Maritime Lien Priorities: Cross-Currents of Theory," 54 *Mich. L. Rev.* 777 at 781 et seq. (1956).

[7] The William Leishear, (D.C. Md. 1927) 21 F. (2d) 862 at 863. See also *Robinson, Admiralty*, 424-425 (1939).

[8] See e.g. Connor, "Maritime Lien Priorities: Cross-Currents of Theory," 54 *Mich. L. Rev.* 777 at 779 et seq., in which it is pointed out that the "proprietary interest" theory is defective in that it fails to account for the fact that a property interest, once accrued, suddenly becomes less valuable by occurrence of one later in time. The "benefit" theory is also criticized on the ground that it breaks down when applied to certain liens, such as the tort or collision lien. At 781, the author states: "The effect of either of these theories, if rigidly applied, would be to encourage the utmost diligence in enforcement. . . . It would not matter that the earlier lienors had no opportunity to enforce their claims by reason of the vessel being out of reach. In fact a literal adherence to the principle would mean that all class rankings would have to give way."

[9] Connor, "Maritime Lien Priorities: Cross-Currents of Theory," 54 *Mich. L. Rev.* 777 at 781 (1956). See e.g. The Proceeds of the Gratitude, (D.C. N.Y. 1883) 17 F. 653; Todd Shipyards v. City of Athens, (D.C. Md. 1949) 83 F. Supp. 67.

[10] See *Gilmore and Black, The Law of Admiralty*, § 9-61 (1957).

[11] (D.C. Md. 1927) 21 F. (2d) 862 at 863. This ranking was cited with approval in Todd Shipyards v. City of Athens (D.C. Md. 1949) 83 F. Supp. 67.

[12] 41 Stat. 1000 (1920); 46 U.S.C.A. § 911 et seq. An excellent discussion of the priorities provisions of the Ship Mortgage Act is found in *Gilmore and Black, The Law of Admiralty*, § 9-68 (1957).

and recorded, is given priority over all maritime liens except "preferred maritime liens": (1) liens arising *before* recordation, and (2) *any* lien of certain specified types, most notably the tort and salvage liens.[13] Qualification must perhaps also be made to the assignment of junior rank to non-maritime claims: an exception has often been said to exist in favor of governmental liens, although recent decisions may not bear this out. This topic will receive further consideration below.

As with common law, there is no assurance that a given court will be prepared to follow these suggested lines of maritime priority. Exceptions and complications constantly arise. But the aviation law practitioner may at least draw upon the admiralty decisions for certain guideposts of priority: (1) priority varies inversely with time; (2) maritime claims outrank non-maritime claims; (3) among themselves, maritime claims are generally ranked by class; and (4) perfected mortgages, while junior in rank to all earlier liens, outrank most subsequent maritime liens.

THE AIRCRAFT: LIEN-GIVING TRANSACTIONS

The fundamental common law and maritime systems of priority provide a background for the further inquiry: What transactions peculiar to the aircraft itself give rise to a lien claim therein? Obviously, the fact that most airplanes today are chattels of considerable value means that long-term financing by mortgage or conditional sale will be necessary, as in the case of land purchase. Thus the common law priority problems involving secured holders and later lienors immediately become pertinent. On the other hand, a similarity between the aircraft and the ship as a mode of conveyance will often mean that the same transactions which traditionally are recognized as giving a maritime lien may also be the basis for a lien in aircraft. Then, too, development of the aircraft lien law may validate certain claims for which there is no precise parallel in either the common law or maritime law systems.

1. *Secured financing devices.* While their specific terms vary drastically, security instruments affecting title to aircraft or aircraft parts may be conveniently grouped under a single heading, since they are generally treated alike by the courts for priority purposes.[14] At present,

[13] See 46 U.S.C.A. §§ 922, 953.

[14] While a distinction may be drawn between the type of security transaction in which title is retained by the seller or lender, as in the conditional sale, and in which title passes to the borrower, as in the mortgage normally, all security transactions are treated alike by the federal aircraft lien recordation act, 53 Stat. 1006 (1938); 49 U.S.C.A. § 523. Decisions involving aircraft liens and their priority have given no indication that a distinction is made, and the assumption is that this is not the practice. It must be pointed out, however, that a distinction between the equipment trust and the conditional sale or mortgage does exist, by virtue of a recent amendment to the Bankruptcy Act. Public Law 85-295, 71 Stat. 617 (1957), approved Sept. 4, 1957 amends § 116 of the Act to permit more favorable treatment in receivership proceedings of the trustee under an aircraft equipment trust. In brief, the amendment permits the parties to an equipment trust to exempt, by contract, the holders thereof from the application of § 116, by which a reorganization court has authority to permit rejection of executory contracts, authorize issuance of certificates of indebtedness, authorize lease and sale of property of the

the mortgage, conditional sale, and equipment trust are the most common forms of security device used for purchase or borrowing by airlines and individual owners.[15] Each of these instruments, when properly recorded under section 503 of the Civil Aeronautics Act, gives rise to a lien which may be asserted against parties *other than* the borrower, as well as the latter.[16]

2. *Government penalty liens.* Violation by the owner or person in command of the aircraft of certain provisions of the Civil Aeronautics Act regarding registration of aircraft, safety certification, postal regulations under the Act, and navigation regulations, will subject the aircraft to a lien for a civil penalty.[17] Proceedings *in rem* directly against the aircraft are authorized by the Act, and the aircraft may be held until the penalty is satisfied. A similar lien may also arise for violation of the Attorney General's regulations designating ports of entry for aircraft, again in the event that the violation is by the owner or person in command of the aircraft.[18]

3. *Government tax liens.* Sections 3670-3672 of the Internal Revenue Code provide that if certain conditions are met by the federal government, a lien for unpaid taxes shall arise "in favor of the United States upon all property and rights to property, whether real or personal," belonging to the delinquent taxpayer.[19] Such a lien arises without regard to solvency, and attaches at the time the assessment list is received by the collector. Varying state statutes, of course, similarly provide with respect to unpaid state taxes.[20]

4. *Liens for tort.* While there has never developed in aviation law a lien for collision damages strictly paralleling the maritime collision lien, many states have enacted uniform "ground damage" legislation providing lien in favor of a party injured by an aircraft or objects falling therefrom.[21] As originally enacted, many of these statutes imposed strict tort liability upon anyone owning an interest in the aircraft and permitted a lien upon all interests in the aircraft to the extent of the damage, thereby discouraging much-needed financing of the airline

debtor, and enjoin or stay until final decree the commencement or continuation of a suit against the debtor. Equipment trust creditors would be able, under the amendment, to take immediate possession of their security in the event of receivership. See H. Rep. 944, 85th Cong., 1st Sess. (1957). As was pointed out in Adkins and Billyou, "Developments in Aircraft Equipment Financing," 13 *The Business Lawyer* 199 (1958), this advantage was not extended to the mortgagee. Thus to a limited extent, financing by the equipment trust has an advantage over other forms of security transaction.

[15] See Adkins and Billyou, "Developments in Aircraft Equipment Financing," 13 *The Business Lawyer* 199 et seq. (1958).

[16] 52 Stat. 1006 (1938); 49 U.S.C.A. (1952) § 523(c). The federal recordation statute will be referred to as § 503 of the Civil Aeronautics Act in this article.

[17] 52 Stat. 1017 (1938); 49 U.S.C.A. (1952) § 623.

[18] 66 Stat. 203 (1952); 8 U.S.C.A. (1952) § 1229.

[19] 53 Stat. 448-49 (1953); 26 U.S.C.A. §§ 3670-3672. The leading recent discussion of this subject is found in Kennedy, "The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien," 63 *Yale L. J.* 905 (1954).

[20] See e.g. *Pa. Stat. Ann.* (1949), Tit. 72 § 3341; *Tex. Civ. Stat. Ann.* (1951) Art. 7083(b)(1).

[21] See e.g. *Del. Code Ann.* (1953) Ch. 2, § 305; *S. C. Code Laws* (1952) § 2-6; *Vt. Stats.* (1947) § 5304.

industry. In 1948, however, federal legislation relieved the situation by providing that persons having a security interest in any civil aircraft would not be liable to such tort claims "unless such aircraft is in the actual possession or control of such person at the time of such injury, death, damage, or loss."[22] As to other owners, however, the statutes remain effective.

5. *Liens for wages.* Although maritime courts have traditionally given sacred status to the lien of the seaman for wages,[23] the only court which has been called upon directly to consider an analogous claim in an aircraft rejected it summarily. In *Greer* v. *Davis Air Lines, Inc.*,[24] it was held that a pilot is not entitled to a lien for his services in operating the aircraft. This holding, however, was based strictly upon the court's interpretation of the scope of the state statute granting priority to "laborer's liens" over an antecedent mortgage. Finding that one asserting a laborer's lien must establish that in the labor performed the manual or physical work preponderated over the intellectual powers, the court held that the work of a pilot was in the nature of a profession and more of an art or calling than mere skilled or unskilled labor.[25] Thus, the court said, plaintiff was not a laborer within the meaning of the statute.

The result is interesting in that while there is no indication that the court considered the maritime analogy, it has been held that the seaman's lien upon the vessel for wages is not to be extended to the master,[26] whose relation to the ship as commander is quite similar to that of the pilot to his aircraft. It is to be doubted, however, that the distinction between master and crew in admiralty will ever be carried over to the aviation area, (1) because the chance is extremely unlikely that an appropriate fact situation, *viz,* one involving a claimed lien for stewardess' wages, will ever arise, and (2) because there is no reason today for a court to invoke in favor of aircraft crew members the ancient notion of the admiralty courts as protector of the uneducated and defenseless seaman.

6. *Repairman's liens.* Abundant state legislation, apart from the common law lien in favor of the artisan or repairman, is found provid-

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[22] 62 Stat. 470 (1948); 49 U.S.C.A. § 524. "Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances. The relief thus provided from potential unjust and discriminatory liability is necessary to encourage such persons to participate in the financing of aircraft purchases." *H. Rep.* 2091, 80th Cong., 2nd Sess. (1948).

[23] Note, 69 *Harv. L. Rev.* 525 at 529 (1958). An early Supreme Court decision making this determination is Sheppard v. Taylor, 30 U.S. 675 (1831).

[24] (Ga. Mun. Ct. 1930) 1930 *U.S. Av. Rep.* 302. See also, for a case indicating the same tendency, Jones v. Bodkin, 172 Okla. 38, 44 P. (2d) 38 (1935).

[25] Greer v. Davis Air Lines, Inc., (Ga. Mun. Ct. 1950) 1930 *U.S. Av. Rep.* 302.

[26] The Orleans v. Phoebus, 36 U.S. 175 (1837). See, however, *Robinson, Admiralty* 369 (1940) where the English rule to the contrary is discussed. The master is given, under American law, a lien upon the freight of his vessel. The Spartan, (D.C. Me. 1828) Fed. Cas. No. 4085.

ing the private or municipal aircraft repairman with a lien for the contract price or reasonable value of his services.[27] In some instances, it is required that for liens in excess of a certain amount to be operative, actual notice must have been given to, and consent obtained from, the legal owner or mortgagee.[28] These statutes operate only in favor of the repairman who contracts with the owner or operator, and not in favor of the repairman's employees.[29] To qualify for a lien upon the aircraft, services must have been performed thereon, and not on some part which subsequently finds its way onto the aircraft.[30] Similarly, a servant of the aircraft owner who supplies the aircraft with gas and oil pursuant to instructions for ordinary operations is not entitled to a repairman's lien under a statute requiring that there be "protection, improvement, safe-keeping, or carriage" of the aircraft.[31]

7. *Storage lien.* Drawing by analogy from the common law bailee's lien and the maritime wharfage lien, a large number of state legislatures have specifically granted a statutory lien for the storage and safe-keeping of aircraft.[32] These provisions most often appear in conjunction with the repairman's lien, and are frequently limited to municipal storage facilities. While it might appear logical that even in the absence of such a statute, a person with whom the owner of the aircraft has contracted for storage would be entitled to a lien for use of his facilities, common law courts were slow to recognize such a lien.[33] A bailee may, however, be able to convince a court that he falls within the broad statutory language granting a lien to "garagemen" or for "storage," where the statute makes no specific mention of hangar facilities for aircraft.[34]

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[27] *Ala. Code Ann.* (1940) Tit. 4, § 29; *Ark. Stat. Ann.* (1947) § 74-605; *Cal. Code Civil Proc.* (1953) § 1208.61 as amended by 1957 Laws Ch. 452; *Colo. Rev. Stat. Ann.* (1953) § 5-5-4(3); *Maine Rev. Stat.* (1954) C. 178 § 62; *Md. Ann. Code* (1951) § 1A-24; *Mass. Ann. Laws* (1956) C. 255, § 31E; *Mich. Comp. Laws* (1948) § 570.303; *Mont. Rev. Codes* (1947) § 1-813; *N. H. Rev. Stat. Ann.* (1952) § 2A-44-2; *N. Y. Consol. Stat.* (1940) *Lien Law* § 184; 3 *Okl. Stat. Ann.* (1941) § 65.6; *Tenn. Acts* (1957) Ch.. 374 § 7(e)(3); *Wyo. Sess. Law* (1957) Ch. 215.

[28] See e.g. *Cal. Code Civil Proc.* (1953) § 1208.62.

[29] In Ross v. Spaniol, 122 Or. 424, 251 P. 900 (1927), employees of the contracting repairman were denied a lien, the court saying at 430: ". . . the work for which the lien was claimed was not done at the request of the owners, but at the request of Woodruff, their employer. There was no privity of contract such as was required at common law between the owners and said employees. . . ." A dissenting opinion in the case was filed, making a broader interpretation of the statute under which the plaintiffs made their claim.

[30] Modern Air Transport, Inc. v. Pacific Airmotive Corp., (N.J. Super. 1952) 90 A. (2d) 108. The court was called upon to interpret the scope of a statute giving the repairman of the aircraft a lien. The court stated, at 109: "It is clear that no lien is given for repairing a piece of machinery which may have been part of an aircraft, or may become such a part, or is suitable for such use. No lien is given for repairing an aircraft part."

[31] Jones v. Bodkin, 172 Okla. 38, 44 P. (2d) 38 (1935).

[32] See e.g. *Ala. Code Ann.* (1940) Tit. 4, § 29; *Colo. Rev. Stat. Ann.* (1953) § 5-5-4(3). Most of the statutes cited in note 27 supra grant the same lien for aircraft storage.

[33] See *Brown, Personal Property* (2nd ed.) § 108 (1936). The reason commonly advanced for such a result is that an owner's right to remove his chattel at will negates the possessory aspect of the common law lien.

[34] A typical statute is *Ore. Rev. Stat.* (1953) § 87.085.

With this preliminary view of the possible liens which may be asserted against an aircraft, we are now in a position to discuss priority relationships among these charges. As is to be expected, the greatest number of statutes and decisions deal with the seniority between sellers or holders of security interests on the one hand, and subsequent lien claimants on the other. It is to this particular contest that the present section is devoted.

1. *In general.* By far the most significant and comprehensive single piece of legislation enacted to cope with aircraft lien priority and notice problems is the federal recordation statute, first passed by Congress in 1938 as section 503 of the Civil Aeronautics Act.[35] Until that time, considerable uncertainty and confusion had been created by the heterogeneous state recording acts, particularly in cases where an aircraft, upon which a security interest had been recorded in one state, was flown to another state for repairs, storage, or maintenance. Many of the statutes provided that proper recordation of a security interest was constructive notice of a prior interest in the aircraft, when in fact there was no actual notice and the means of discovering prior interests were exceedingly difficult and unreliable.[36] The problem was accentuated by the extreme facility with which an aircraft could be flown from the state of recordation to one far removed therefrom.

Congress' partial solution was to require, for effective notice to subsequent potential lienors, central recordation of aircraft title and security interests with the Civil Aeronautics Authority in Washington. After authorizing the C.A.A. to set up such a system, the provision stated:

> "(c) No conveyance the recording of which is provided for . . . shall be valid in respect of such aircraft . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any persons having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator."[37]

Upon compliance with the recordation requirement, further recordation with another agency or governmental unit was unnecessary for validity.[38] The state recording acts, therefore, were tacitly superseded.

After ten years of successful operation of the new central recordation system for aircraft interests, Congress amended the provision to permit similar notice of liens in aircraft engines and spare parts.[39] This amendment further broadened the airlines' credit position, plac-

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[35] Note 16 supra.

[36] See Note, 48 *Col. L. Rev.* 1248 (1948).

[37] Note 16 supra, § 523(c).

[38] Ibid., § 523(d): ". . . each conveyance or other instrument recorded by means of or under the system provided for . . . shall from the time of filing be valid as to all persons without further or other recordation. . . ."

[39] See 62 Stat. 494 (1948). For the regulations presently in force under the statute, see 20 F.R. 301 (1955), 14 C.F.R. Part 503; 20 F.R. 3302 (1955), 14 C.F.R. Part 504; 20 F.R. 4321 (1955), 14 C.F.R. Part 505.

ing them in a better position to borrow against their substantial investments in stand-by equipment. As was recently indicated, however, the amendment also posed problems with respect to (1) identification of recorded spare parts and (2) possibly conflicting priority between security interests in the aircraft to which a part might become attached, and the lien on the part itself. These are refinements which have yet to be judicially considered, although sensible suggestions for their solution are already proposed or in operation.[40]

It was immediately apparent that for the central recording system to be effective, it would have to extend to all domestic aircraft, including those used solely in intrastate operations. Congress' power under the Commerce clause left no doubt as to the validity of the recordation section for interstate aircraft. Shortly following the enactment of the provision, however, a decision was handed down in a lower New York court, in *Aviation Credit Corp. v. Gardner*,[41] declaring section 503 unconstitutional to the extent that it required recordation of interests in intrastate-operated aircraft.

This holding passed unchallenged until a similar problem arose eight years later in *In re Veteran's Air Express Co.*,[42] where priority between an antecedent federally-recorded mortgage and a subsequent repairman's lien upon an intrastate aircraft was at issue in a reorganization proceeding. Observing that the *Gardner* decision had held section 503 to be unconstitutional in its intrastate application, the New Jersey federal district court flatly rejected such a theory. The court upheld the statute in its application to intrastate aircraft by analogy to earlier Supreme Court decisions recognizing congressional control over navigation as a part of commerce. Since, the court said, the enunciated test of navigability—"affording channels of communication among the States or for commerce with foreign countries"—may be logically applied in the case of aircraft navigation as well, then "Congress has control over navigation in the air. . . . Such navigation constitutes commerce as surely as does the carriage of passengers and goods by water. . . . The only further comment required is to point out the

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[40] Adkins and Billyou, "Developments in Aircraft Equipment Financing," 13 *The Business Lawyer* 199 at 203 et seq. (1958): "It is customary to include in the chattel mortgage or conditional sale agreement a comprehensive description of the various types of spare parts (at least those of major importance) and to specify as locations all the airports served by the air carrier in question and any other depots where such spare parts may be kept. So far, it has not been necessary to test in litigation the effectiveness of the lien on spare parts perfected by such recordation.

"Where there are mortgages or conditional sale agreements covering different aircraft operated by the same carrier, because of the importance of having everything physically attached to a particular aircraft at the time of default subject to the same lien, provision is sometimes made for the interchangeability of liens. The effect of such a provision is that the lien of a particular mortgage on any particular spare part which becomes attached to an aircraft subject to another mortgage will be deferred to the lien of the other mortgage so long as the spare part remains so attached. Such a provision is probably operative under a chattel mortgage but raises question under conditional sale agreements since the conditional sale vendor probably is not a vendor of all the spare parts which became attached to his aircraft."

[41] 174 Misc. 798, 22 N.Y.S. (2d) 37 (1940).

[42] (D.C. N.J. 1948) 76 F. Supp. 684.

incontestible conclusion that Congress has the full power to control all aviation activity, since there is no section of the navigable circumambient atmosphere of the United States which is not a part of 'a continuous channel for commerce among the states or with foreign countries.' "[43] The court also hinted at a second ground for extension of the federal recordation system to intrastate aircraft—one which is finding increasing sympathy in the Supreme Court: "Unquestionably, attempted restriction of Federal rights by over-clamorous and undue insistence on States rights add nothing to the importance of the State, and by hampering the Activities of the National Government destroy the effectiveness of its operation in the matters which concern all of the people."[44] Thus the court invoked the argument of *United States* v. *Darby Lumber Co.*,[45] that in some instances it may well be necessary to regulate purely intrastate commerce in order to insure the effective operation of an interstate program.

Although the reasoning of the court has been subjected to considerable criticism among the commentators,[46] the result of the case on the constitutional issue has not been challenged, and indeed has been approved by courts subsequently having occasion to decide the same question.[47] When one considers the mobility and transitory status of the modern aircraft, the necessity for inclusion of all civil aircraft in the central recordation system is readily apparent. It is submitted, therefore, that the constitutional determination of *In re Veteran's Air Express Co.* is correct and would be upheld by the Supreme Court on principles analogous to those suggested in the *Darby* decision.

2. *Meaning of Section 503.* Accepting the constitutional validity of the section, we are then faced with the more important question—what priority in right is obtained by a security holder through federal recordation? Clearly it is not axiomatic that recordation assures priority as to subsequent lienors, and the statutory language cannot be construed in such a way as to leave the matter free from doubt. The statute merely provides that conveyances or other instruments filed for recordation "shall be valid as to all persons. . . ." It does not speak in positive terms of priority, as does for instance the Ship Mortgage Act of 1920 discussed above.

Again it was *Aviation Credit Corp.* v. *Gardner* which first interpreted the meaning of section 503. In that case, the issue presented involved the respective rank of an antecedent federally-recorded mort-

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[43] Ibid., at 690.

[44] Ibid.

[45] "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." United States v. Darby Lumber Co., 312 U.S. 100 at 118 (1941). Cf. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

[46] See Note, 48 *Col. L. Rev.* 1248 (1948); Note, 10 *U. Pitts. L. Rev.* 79 at 80 et seq. (1948).

[47] Blalock v. Brown, 78 Ga. App. 537, 51 S.E. (2d) 610 (1949); Dawson v. General Discount Corp., 82 Ga. App. 29, 60 S.E. (2d) 653 (1950).

gage on an intrastate aircraft, and the lien of a judgment creditor of the mortgagor seeking to levy upon the aircraft. The court held that failure by the mortgagee to record his interest in accordance with state lien laws barred him from claiming priority by virtue of constructive notice, and rendered judgment for the levying creditor.

It remained for the *Veteran's Air Express* court to challenge the validity of this conclusion. Faced with the competing claims of a mortgagee whose lien had been federally recorded, and a subsequent lienor for repairs upon an intrastate aircraft, the court found that the lien of the mortgagee was senior. In so holding, it rejected the repairman's assertion of priority based upon common law principles and the local statutes, stating that since the federal recordation act extends to intrastate aircraft, the lien claimed thereunder was senior to any claim established by state law affecting the same object. Significant to this holding, however, is the fact that the mortgagee here in the case was the United States government. The court appeared to place considerable emphasis[48] upon its conception of the high position of government liens and indeed, to the extent that the mortgagee is a federal agency, equated passage of the recordation statute with establishment of priority for the recording party.

While the court is undoubtedly correct that Congress may establish the priority of its liens with respect to liens asserted by private individuals under state statutes or by virtue of common law, one may seriously question whether it intended to do so in this instance. The purpose of the statute was reportedly to eliminate confusion engendered by a multitude of state recording systems by providing a single basis for constructive notice,[49] not to establish the priority of a recorded security interest over all subsequent claims. The only situation in which priority appears to be determined by operation of the statute is where the security holder has failed to record his interest. Such failure invalidates the conveyance as to innocent third persons.[50] But recordation itself merely validates; it does not grant priority. Certainly there is much respectable authority in this country preferring the lien of the artisan to that of the antecedent holder of a recorded security, either on a theory of implied consent or agency.[51] There is no indication that Congress intended to overrule such authority by passing section 503.

The only other federal court to consider a similar problem with respect to section 503 failed to demonstrate the confidence, indicated

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[48] "Since, then, this court is of the opinion that the regulatory provisions of recordation in accordance with the Civil Aeronautics Act is within the scope of proper application of Federal law in a field of Federal competence, the lien claimed by the United States of America is senior to any claim established under a State law affecting the same object. No condition or requirement, inconsistent with the expressed will of Congress in matters such as this over which it has constitutional authority may be established by any state in derogation of the rights and interests of the United States. . . ." In re Veteran's Air Express Co., (D.C. N.J. 1948) 76 F. Supp. 684 at 691.

[49] Hearings before Committee on Interstate and Foreign Commerce on H.R. 9738, 75th Cong., 3rd Sess., p. 405 (1938).

[50] Note 16 supra, §§ 523(c), 523(d).

[51] *Brown, Personal Property* (2nd ed.) § 112 (1936).

in *Veteran's Air Express Co.*, that federal recordation provided priority. In *United States* v. *United Aircraft Corp.*,[52] a case arising before the aegis of the section was extended to aircraft engines, the court was called upon to determine priority between a federally-recorded mortgage asserted by the United States, and a subsequent lien for repairs to aircraft engines. The court dodged the central priority issue of the *Veteran's* case by holding that the mortgage insufficiently described the engines to provide fair notice to subsequent potential lienors and was therefore void as to third parties, under the mandate of the federal statute.[53] The repairman was thus preferred, not because the court found him prior in right to the recording mortgagee, but because the mortgage itself was no basis upon which to assert a valid lien. The court explicitly stated that it did not reach the question of whether an artificer's lien can take precedence over a *valid* government lien, but in *dicta* did remark that there appeared to be no crippling danger to the United States as holder of security for a debt, in applying the same rules of priority as are applied to the ordinary citizen. This language would appear to take specific exception to the reasoning of the *Veteran's* case that preference for a lien created under state law would constitute interference with federal lien supremacy. The *United Aircraft* decision by no means rejected the idea that an artificer's lien may take precedence over an antecedent properly-recorded mortgage, saying "it may well have been the intent of the contracting parties to the mortgage that an artisan's lien should have priority over the rights of mortgagee."[54]

3. *Priority of the security interest.* If we then accept the apparent thesis of the *United Aircraft* decision that the federal recordation statute does not purport to affect or change existing priority doctrines by its terms, our next question must necessarily be: Which is senior, a recorded mortgage or a subsequent lien upon the aircraft? As one may surmise, the decisions on this point are by no means uniform, and perhaps the best answer that can be given is that seniority will depend upon the nature of the subsequent claim asserted.

a. *As against the debtor himself.* Whether it is recorded or not, the security transaction instrument, if contractually valid, binds the purchaser or borrower, his assigns and devisees, and persons with actual notice of the transaction.[55] It has been specifically held under section 503 that failure to record does not void a conveyance as between buyer and seller.[56] To this extent, perhaps, the statute does affect "priority" in a loose sense.

b. *As against subsequent purchasers.* It is relatively clear that where

[52] (D.C. Conn. 1948) 80 F. Supp. 52. Noted, 24 *Notre Dame Lawyer* 435 (1949).

[53] The court felt that the description in the mortgage of the aircraft did not sufficiently identify the engine upon which the work was done.

[54] United States v. United Aircraft Corp., (D.C. Conn. 1948) 80 F. Supp. 52 at 55.

[55] Failure to record does not invalidate the transaction under Section 503 as against these persons. Note 16 supra.

[56] Bishop v. R. S. Evans East Point, Inc., 80 Ga. App. 324, 56 S.E. (2d) 134 (1949).

the right asserted by the subsequent claimant is that of title based upon a sale from the original borrower or mortgagor, a mortgagee who has retained title and who has caused the conveyance to be properly recorded with the C.A.A. will prevail, although there is no actual notice of outstanding title to the subsequent purchaser. In *Dawson* v. *General Discount Corp.*,[57] the court stated that defendant, "before purchasing, had the opportunity to ascertain the paramount outstanding title by checking the records of the Civil Aeronautics Authority. This being so, his title to the aircraft was inferior to that of plaintiff. . . ." That a similar result would have been reached had the first security-holder's interest been merely in the nature of a lien rather than title itself, there should be no doubt. A mere purchaser from the borrower, it would appear, has a clear duty to search title of his vendor or be subordinated to previously recorded interests in the aircraft.[58] Such a result is a clear expression of the basic common law priority rule that between conflicting titles based upon transfer from the same source, *qui prior est tempore potior est jure*: stated otherwise, no-one can transfer a greater right than he himself has.[59]

When, on the other hand, the first purchaser or security-holder neglects to record his interest, the common law rule is forgotten and his interest is declared by section 503 invalid against all but the borrower, his successors, and persons with actual notice of the transaction. Thus in *Blalock* v. *Brown*,[60] where there was no showing that the second purchaser had actual notice of the previous but unrecorded sale, the court held that the claim of the second purchaser was to be preferred under the federal recordation statutory provisions.

c. *As against subsequent attaching creditors.* When the subsequent claimant is merely an attaching creditor, but the security holder has neglected to record his interest, the common law rule is again disregarded. Thus in *Wilson* v. *Barnes*,[61] in which the purchaser of ten aircraft failed to have the sale instrument recorded and the goods were then attached by a creditor of the vendor having no actual notice of the sale, the court held that absence of constructive notice of the previous interest prevented the purchaser from asserting better title. *Contra,* however, is *Marshall* v. *Anderson*,[62] where the court held that failure of the first purchaser to have his title recorded would not bar him from asserting his title against a subsequent creditor attaching the aircraft for a debt owing from the original vendor based on an independent transaction. The court noted that there was no showing that the attaching creditor was defrauded or misled by the omission

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[57] 82 Ga. App. 29, 60 S.E. (2d) 653 (1950).

[58] *Jones, Mortgages,* § 670 (1914); *Jones, Chattel Mortgages,* § 236 et seq. (1908).

[59] See excellent discussion of basic common-law priority doctrines in *Durfee, Cases on Security* (3rd ed.) 248 et seq. (1934).

[60] 78 Ga. App. 537, 51 S.E. (2d) 610 (1949). See also United States v. All-American Airways, Inc., (9 Cir. 1950) 180 F. (2d) 592.

[61] 359 Mo. 352, 221 S.W.(2d) 731 (1949).

[62] 169 Kan. 534, 220 P. (2d) 187 (1950).

to record, since he did not rely on the federal records. Finding that at least equitable title was in the purchaser, the court stated that it would not seem fair or logical to prefer the attaching creditor, who according to the common law doctrine could acquire no greater right in the property seized than his debtor.

It is submitted that the *Wilson* result is to be preferred as giving effect to the express wording of the federal recordation statute, "no conveyance shall be valid . . . until such conveyance . . . is filed for recordation in the office of the Administrator."[63] It is difficult to see how the *Marshall* court could construe such language to prefer the purchaser who has failed to record. An exception to the mandate of the statute is made only when the party asserting invalidity of purchaser's title is borrower himself, his heirs or devisees, or a person with actual notice of the transaction.[64] An attaching creditor is normally none of these.

The value of a central recording system is in its reliability: if an instrument is recorded there, the whole world is deemed to have constructive notice thereof; if it is not, then no title exists. Actual reliance by a subsequent attaching creditor is not made by the statute a prerequisite to assertion of "priority," and should not be demanded by the courts.

d. *As against subsequent repairmen.* Where the subsequent claim is based upon a lien for repairs, the decisions are less clear. The only decision besides *In re Veteran's Air Express* to rule upon the point directly since passage of the federal recordation statute is *Anderson* v. *Triair Associates, Inc.*[65] in a lower Wisconsin court. There, despite the fact that the mortgage had been filed with the Civil Aeronautics Authority, the court held that a repairman was not required to inquire concerning the existence of a mortgage filed or recorded with the C.A.A. under section 503, or filed in a county in another state. To the contrary, "one making repairs and thereby preserving the value of personal property from disintegration or destruction is upon principle entitled to priority over any other lien which is not actually known to the mechanic making the repairs or for which he is not charged with knowledge constructively under the statutes of the state."[66] The court felt that it was inequitable to charge repairmen, often making repairs under emergency conditions and materially enhancing the value of the property, with constructive notice of mortgages filed perhaps long distances from where the repairs are made. A similar result was reached prior to the passage of a federal recordation system in *Boise Flying Service* v. *General Motors Acceptance Corp.*,[67] where the antecedent mortgage was recorded in a state other than the one in which the repairs were made.

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[63] Note 16 supra.
[64] Ibid.
[65] (C.C. Wis. 1947) 149 *U.S. Av. Rep.* 440.
[66] Ibid., at 448.
[67] Boise Flying Service v. G.M.A.C., 56 Ida. 5, 36 P. (2d) 813 (1934).

In another pre-1938 decision, *Atlas Securities Co.* v. *Ramsey,*[68] however, preference was given to the antecedent security holder despite the fact that he had failed to register his instrument under the old non-exclusive federal registration system. Such an omission today would no doubt have been fatal to his interest, and the subsequent repairman would have obtained priority in any event, since section 503 purports to affect priority to the extent of invalidating instruments not properly recorded. But the decision is significant in that it places emphasis upon the notice-giving aspect of a central recordation system as a basis for priority. The court, in preferring the non-recording security holder, appeared to rely strongly on the failure of the repairman to search the records. A legitimate inference from the decision is that if a diligent search by the repairman had not disclosed the earlier interest, he would have been successful in obtaining first priority. Such emphasis upon the notice aspect of recordation, together with the court's preference from the antecedent security-holder where both parties may be said to have been remiss, leads one to believe that the *Atlas* judges today would be willing to grant seniority to the antecedent holder in any event, once he filed his interest for record with the federal government. This, of course, is a result akin to that in *In re Veteran's Air Express,* although the reasoning of the two courts cannot be said to be similar. Together, however, the two decisions may be said to represent the view that the antecedent security-holder is to be preferred if his lien has been properly recorded, contrasting the opposite tendency in the *Anderson* and *Boise* cases above.

Aside from this case law on the subject, one finds a limited amount of legislation dealing with the contest between antecedent security interests and subsequent liens. While there can be little question that the states recognize federal pre-emption of the aircraft recordation field, a number of states have not interpreted section 503 as preventing them from continuing to declare priority with respect to liens arising upon aircraft within the state. Still in force in Alabama is a statute granting first priority to liens of municipal airports for supplies, repairs, and storage—with an exception in favor of local tax liens.[69] Maine allows a repairman's lien "which takes precedence of all other claims and incumbrances on said . . . aircraft . . . not made to secure a similar lien. . . ."[70] In Maryland, on the other hand, the importance of federal recordation has been recognized. With reference to materialmen's liens, the Maryland statutes provide: "said lien shall be subordinate only to the holder of a bill of sale, contract of conditional sale, conveyance, mortgage, or assignment of mortgage for or on the aircraft . . . which has been executed and recorded with the Administrator of Civil Aeronautics. . . ."[71] Michigan grants similar priority to the security holder upon payment to the repairman of up to $400.00,

[68] 262 Ill. App. 559 (1931).
[69] *Ala. Code Ann.* (1940) Tit. 4, § 29.
[70] *Maine Rev. Stat.* (1954) C. 178, § 62.
[71] *Md. Code Ann.* (1951) § 1A-24.

which amount may then be added to the amount of the security-holder's lien.[72] In New Jersey, which undoubtedly boasts the most comprehensive statutory scheme governing aircraft liens, a repairman's lien incurred at the request of the owner, his representative, agent, or lessee, is "superior to all other liens, except liens for taxes, and the operator of such aircraft shall be deemed the agent of any owner, mortgagee, conditional vendor, or other lienor thereof for the creation of such superior lien."[73] To these statutes, which expressly deal with aircraft, may be added a multitude of statutes in which priority is granted to one party or the other without specific reference to the aircraft,[74] and upon construction of which a court could be expected to extend its operation to aircraft if asked to do so.

Where the subsequent claimant is a repairman, then, one is faced with a confusing conflict in the decisions and the statutes. This is by no means a novel situation: the argument concerning the opposing seniority of the mortgagee or conditional vendor, on the one hand, and the repairman on the other, has been raging for many years.[75] The inconsistency of the results in the cases may be laid no doubt to the fact that potentially, there are innumerable variables which may come into play. Is the security-holder a conditional vendor who has retained legal title, or is he merely a mortgagee with, in some jurisdictions,[76] only a lien on the aircraft? Upon what basis does the repairman assert his claim—by virtue of common law or under a statute? Has either party been guilty of laches or neglect? Was the security instrument recorded? Was it sufficiently definite in its description? Has there been an opportunity for actual notice? These factors, among others, are both legal and equitable in nature, and because they are so numerous, accurate prediction of what a court will do in a given situation will never be possible without specific statutory mandate.

A solution to the problem has been suggested by Professor Brown, who has written:

> "Might it not be better to recognize openly that the claim of the subsequent mechanic or serviceman is not based on authority from the mortgagee or vendor at all, but on *quasi*-contractual principles. The subsequent claimant should be permitted to recover from the prior mortgagee or conditional vendor for the reasonable value contributed to the chattel in question by the former's services. In such an event, of course, his lien would not necessarily be for the price at which he had contracted, but only to the extent that the mortgagee has benefited as a result of his services."[77]

This suggestion has received occasional approval by the commentators,

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[72] *Mich Comp. Laws* (1948) § 570.301.

[73] *N. J. Stat. Ann.* (1952) § 2A:44-2.

[74] The most recent compilation of states in which decisions have turned on express statutory preference appears in annotations, 36 A.L.R. (2d) 198 and 36 A.L.R. (2d) 229 (1954).

[75] See *Brown, Personal Property* (2nd ed.) § 112 (1936).

[76] See *Glenn, Fraudulent Conveyances and Preferences*, §§ 497-499 (1940).

[77] *Brown, Personal Property* (2nd ed.) § 112 (1936).

and has been adopted in modified form as to aircraft in at least one state.[78]

An additional possibility for solving the conflict is found in the federal recordation statute itself. Section 503 (g) authorizes the Civil Aeronautics Authority to provide by regulation for endorsement, upon certificates of registration or aircraft safety certificates, of information with respect to the ownership of the aircraft for which the certificate is issued and of other information affecting title to the aircraft.[79] The Civil Aeronautics Authority has not enacted regulations to place this scheme in effect, although it is reported that most aircraft security instruments "specifically require that notice of the existence of a security interest be displayed in the aircraft, generally in close proximity to the certificate of airworthiness, and frequently require that engines and other important spare parts be appropriately marked."[80] Such a requirement, if put into the form of a regulation, would make disclaimer of actual notice by repairmen considerably more difficult. On the present piecemeal basis, however, it is to be seriously questioned whether the repairman can be said to owe a duty to check for such notice upon each aircraft he services. In large-scale airline operation, there is no doubt that such a system is effective; the smaller repairman, however, has considerably less assurance that the title certificate displayed is either up to date or valid in its inception. The possibility of forged certificates, particularly in the latter situation, poses a continual threat to the efficacy of this system of notice.

Although any suggested solution *a fortiori* belies the sympathies of its author, the writer feels sufficiently compelled by the repairman's equities to pose an alternative recommendation. That a central recordation system has provided a more efficient and trustworthy means of determining aircraft ownership, few will doubt. But the constructive notice provided by C.A.A. records in Washington, while of considerable assistance to the larger corporate repair facility, is of little real value to the hangar-keeper in Grand Forks, North Dakota. Called on to furnish repairs to a small plane enroute from Minnesota to Oregon, the Grand Forks repairman has three alternatives: (1) insist on a cash transaction; (2) refuse to commence repairs until C.A.A. records have been checked; or (3) take his chances. None is really attractive to the entrepreneur in every case. Mortgagee or conditional vendor, on the other hand, is fully aware that his security is in a highly mobile instrument of transportation which may need frequent repairs and servicing.

With considerations such as these in mind, it is perhaps possible to suggest an effective solution to the competing interests of the claimants. Such a solution is found in the applicable provision of the

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[78] Note 72 supra.

[79] 52 Stat. 1006 (1938); 49 U.S.C.A. 523(g) as amended 62 Stat. 494 (1948).

[80] Adkins and Billyou, "Developments in Commercial Aircraft Equipment Financing," 13 *The Business Lawyer* 199 at 205 et seq. (1958).

Uniform Commercial Code, which appears perfectly tailored for the aircraft priority problem:

> "When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise."[81]

The author suggests that section 503 be amended by (1) the deletion of sub-division (g)[82] as it presently stands; and (2) the substitution therefor of the quoted provision of the Uniform Commercial Code.

This recommended change, it should be noted, assures a uniform national rule to the extent that a repairman asserts a common law lien —his interest is prior to the holder of the security instrument. If a state should desire to alter the rule, it could do so merely by setting up the statutory basis upon which a repairman could acquire a lien in that state, and prescribing the priority of that lien in relation to antecedent security interests. The repairman, assured that he has priority under the federal law, need only familiarize himself with the aberrations of his own state's legislation. The mortgagee or vendor, aware that his interest is normally to be considered junior to that of subsequent artisans, will at the time of the original transaction with the borrower, take such steps as he deems necessary to require adequate collateral security. It may be that in any given instance, legislation of the state in which repairs are made will give preference to the antecedent security-holder's claim. If this is the case, then he is that much better off. It may even be that a state will have adopted the compromise solution suggested by Brown, so that the repairman will only be preferred to the extent of the amount by which he has benefitted the security-holder by enhancing the aircraft. From the security-holder's point of view, this is still better than the junior status for which he is theoretically prepared.

The argument may no doubt be raised that such a system would tend to discourage borrowing. There is little question that this is true, but the author submits that the advantages accruing through certainty of priority outweigh the possible deleterious effect that the change would have upon aircraft financing.

In summary, the recommended provision gives preference to the party less equipped to be certain of his security, in all cases where the local statute does not declare otherwise. It defers to state power where the state chooses to exercise it. Most important, perhaps, it encourages the free flow of commerce through the assistance that it gives the re-

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[81] *Uniform Commercial Code*, § 9-310 (1952). Cf. *Security Restatement* § 76 (1941): "Subject to the provisions of recording statutes, where a lien exists in consequence of the bailment of a mortgaged chattel or of a chattel held under a conditional sales contract, the interest of the mortgagor is prior to that of any lienor except a hotelkeeper . . . a landlord . . . or a connecting carrier . . . unless words or circumstances justify the inference that the mortgagee or conditional vendor has consented to subordinate his interest."

[82] Note 79 supra.

pairman, where otherwise he might be reluctant to return an aircraft to operating condition.

e. *As against other claimants.* In contrast to the relatively large number of cases involving competing claims of repairmen and antecedent security-holders, there is scant judicial pronouncement upon the priority between the latter and claimants basing their liens on other transactions. All that has been said of the repairman would appear to have equal application to subsequent contract suppliers of shelter and goods to the aircraft. Many of the state statutes awarding a lien to the aircraft repairman do the same for the hangar-keeper.[83] As to other suppliers of services, however, it may be a fine question in each case whether the supplier will actually come within the terms of the statute.

As mentioned previously, Section 504 of the Civil Aeronautics Act, passed in 1948, now prevents persons injured by the tortious conduct of an aircraft operator from asserting their claims against those holding a security interest in the aircraft, unless the latter are responsible for the conduct.[84] State statutes not expressly declaring this exception to their "ground damage" statutes must be read with this in mind.

In *United States* v. *Batre,*[85] decided in 1934, the court held that the lien of the antecedent mortgagee was inferior to a subsequent penalty lien of the government for violation of the immigration laws. The court remarked that

> ". . . if a lien created by a chattel mortgage is held superior to this penalty lien, those so disposed can always evade it by mortgaging the airplane up to or beyond its actual value, with the result that the government would never collect the penalty and the law would be without force. . . . An inspection of the act and the regulations pursuant thereto further indicates that revenue alone is not the sole purpose of the law. A firm hold upon the immigration, narcotic drug trade, and protection to the public health is also contemplated."

It has been remarked that the result reached here is that which obtains under the general admiralty laws in similar cases.[86] There is considerable question as to the accuracy of such a statement. Indeed, in *The Melissa Trask,*[87] a government penalty claim was held inferior to the interest of a preferred ship mortgage. Authority that the penalty lien is senior is not to be found in the recent cases.[88]

As to government tax liens, however, the case may be different. In *The Melissa Trask,* such a lien was held superior to the preferred mortgage, because of the fundamental "policy of the government to insist on priority for taxes."[89] The holding of the court as to taxes has

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[83] Notes 27 and 32 supra.

[84] Note 22 supra.

[85] (9 Cir. 1934) 69 F. (2d) 673.

[86] Note, 5 *J.A.L.* 495 (1934).

[87] (D.C. Mass. 1923) 285 F. 781. See also Fridlund, "Federal Taxes and Preferred Ship Mortgages," 38 *Harv. L. Rev.* 1060 et seq. (1925).

[88] The Thomaston, (D.C. Md. 1928) 26 F. (2d) 279; The Antigostine, 22 U.S. 409 (1824). Cf. The Mariam, (9 Cir. 1933) 66 F. (2d) 899.

[89] The Melissa Trask (D.C. Mass. 1923) 285 F. 781 at 783.

been criticized severely,[90] and three more recent cases[91] have held that a tax claim of the United States is outranked even if it antedates a maritime lien for supplies. Indeed, it has been suggested by excellent authority that if government liens are to be permitted to upset an already established system of maritime lien priority, the step should be taken by Congress and not the courts.[92]

While, then, there is little precedent from the admiralty courts that government liens are to be preferred over the mortgage, there is some logic in the *Batre* argument that postponement of the penalty lien would defeat the policy of the statute. To a limited extent this is no doubt true, but this argument ignores the facts that (1) it is not normally the holder of the security who has violated federal regulations; and (2) the civil penalty may be satisfied out of other property of the offending party as well as the aircraft.[93] Thus there appears little justification for subordination of the security-holder to the government penalty claim, when in fact the government has an alternative for enforcement against the party actually responsible.

As to federal tax lien priority, no decision has as yet appeared involving a tax lien as against an antecedent mortgage upon an aircraft. Section 3466 of the Revised Statutes[94] may give some hint as to government policy on this point—it provides that debts owed by the federal government by an *insolvent* person shall take first priority. The Supreme Court, however, has indicated that a "specific and perfected" lien will nevertheless take precedence, and thus far the government has conceded that a perfected security instrument will qualify as prior.[95] This concession has never been put to a judicial test.

It is suggested that the government lien for taxes should be given the same priority position as to aircraft as the government penalty lien. The holder of the security, presuming that he has properly recorded his interest, should not be burdened with the financial misdeeds of

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[90] See *Gilmore and Black, The Law of Admiralty* 622-624 (1957). See also 35 *Yale L. J.* 876 (1926).

[91] The River Queen, (E.D. Va. 1925) 8 F. (2d) 426; The J. R. Hardee, (S.D. Tex. 1952) 107 F. Supp. 379; Abraham H., (1 Cir. 1957) 247 F. (2d) 209. The last case, at 212, states: "Throughout the long history of the general maritime law, maritime liens have uniformly been given preference over secured non-maritime claims of other kinds, both prior and subsequent. The theoretical basis for the primacy of maritime claims is that they 'attach to the vessel itself as an instrument of commerce,' while other claims are derived only through the owner. Accordingly, maritime liens have taken priority over claims of the United States when the vessel has been forfeited to the government."

[92] *Gilmore and Black, The Law of Admiralty,* 624 (1957), cited with approval in Abraham H. (1 Cir. 1957) 247 F. (2d) 209. Cf. United States v. All-American Airways, Inc., (9 Cir. 1950) 180 F. (2d) 592 in which a federal tax lien upon an aircraft, recorded in Washington State, was held not enforceable against the aircraft in possession of a bona fide purchaser without notice in California.

[93] 52 Stat. 1017 (1938); 49 U.S.C.A. § 623(b); 66 Stat. 203 (1952), 8 U.S.C.A. § 1229. Violations of safety regulations are also punishable by criminal action. See 52 Stat. 1015 (1938); 49 U.S.C.A. § 622(h).

[94] *Rev. Stat.* § 3466 (1875); 31 U.S.C.A. § 191. The discussion in this paper of government tax lien priority is drawn substantially from the most recent comprehensive article upon the subject. Kennedy, "The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien," 63 *Yale L. J.* 905 (1954).

[95] *Gilmore and Black, The Law of Admiralty* § 9-73 (1957).

his debtor which, in contrast with the possibility of potential repairs to the aircraft, he has no reason to anticipate. The government still has available to it the criminal sanction[96] and the possibility of levy upon other property of the delinquent taxpayer. Congress has not suggested priority for the tax lien beyond the case involving an insolvent person—until it does so, reason should dictate a junior status for the government lien as against an antecedent security interest.

Other Competing Claimants

While it is not feasible to discuss suggested priorities for every possible further situation in which two claimants have asserted competing liens, it is possible to review the remaining decisions and statutes affecting aircraft lien priorities which have appeared thus far.

One of the earliest, and perhaps the most interesting, of the decisions is *U. S.* v. *Curtiss-Robin Airplane NC-75—H*,[97] where liens accrued in the following time sequence: government penalty lien for operating the aircraft without a license, lien for aircraft storage, and finally, lien for labor and material supplied in repairing the aircraft. With a minimum of discussion, and without setting forth its reasons, the court held that the claim for storage was superior to the claim for repairs and labor, and that both were superior to the government penalty lien. All the claims were inferior to the charges for court costs —a finding entirely consistent with admiralty and bankruptcy practice.[98] The junior position assigned the government penalty lien would appear to follow the same policy suggested as favoring its junior status with respect to the antecedent mortgagee. There was no indication that either the storage lienor or the repairman had constructive notice of the penalty, and neither appeared to have been at fault in incurring it.

The court's preference, however, for the storage lien over the repairman's lien is more difficult to understand. It appears that the court followed the common law time-right maxim in assigning priority between the two contract lienors. This does not strictly jibe with the court's fixing of junior status for the penalty claim, which was prior in point of time to either of the contract liens, if the court intended to pursue the time-right maxim exclusively. At the risk of reading too much into the decision, one may suggest that the court followed a policy similar to that encountered in the admiralty courts. Occasionally the case will arise under maritime law in which strict application of priority based on time and priority based on class will bring differing results, as where a claim for seaman's wages from an earlier voyage competes with a claim for supplies from a later voyage. By application of the inverse-time-right doctrine, the supplyman's lien is superior.

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[96] 53 Stat. 440 (1954); 26 U.S.C.A. § 3616.

[97] (D.C. Fla. 1932) 1933 *U.S. Av. Rep.* 164.

[98] See *Gilmore and Black, The Law of Admiralty*, § 9-61 (1957) and the priority provisions of the Bankruptcy Act, 30 Stat. 563 (1898); 11 U.S.C.A. § 104.

On the basis of class, however, the wage claim has priority. The admiralty courts, in these instances, tend to follow the priority system dictated by the class of claim, subordinating the time priority system to an inferior status.[99] This appears to be what the court has done here. First assigning priority by class, the court relegated the penalty lien to junior position. Then, faced with choosing between two contract claims for the senior position, it chose the lien which had accrued the first. Because of the apparently deliberate choice exercised between time and class priority by the court, the decision may well be one of the best indications that class, rather than time, is the important factor in determining aircraft lien priority.

In *United States* v. *One Fairchild Seaplane,*[100] it was held that a repairman furnishing repairs to a seaplane obtained a maritime lien which took precedence over an antecedent lien for penalties asserted by the federal government. This decision, in its class preference for the repairer's lien over the penalty lien, is consistent with the holding in *Curtiss-Robin.* It was reversed, however, in *United States* v. *Northwest Air Service, Inc.,*[101] on the ground that the repairman had not acquired a maritime lien and, on the authority of the *Batre* case, because a penalty lien in favor of the United States is paramount to ordinary liens of a non-maritime nature. It is suggested that this decision is incorrect for the same reasons as those set out in the discussion of the *Batre* case. Until Congress dictates otherwise, the better view is found in the lower court and *Curtiss-Robin* opinions.

Summary and Conclusion

It is readily apparent from the foregoing discussion that the subject of lien priorities in aircraft is attended by as much confusion and unpredictability as is the broader subject of priorities in general. The courts and legislatures have drawn indiscriminately from common law rules, admiralty precedents, and their own notions of equity in fashioning a set of priority principles for application to security interests in aircraft. If a count were taken, one might perhaps find a greater tendency to subscribe to common law doctrines of time priority on the one hand, and traditional maritime doctrines of class priority — the Ship Mortgage Act excepted — on the other. The maritime concept that "last in time is prior in right," fading in importance in the admiralty courts themselves, does not appear to have received much attention from courts and legislatures called upon to decide lien priorities in aircraft. The later repairman is preferred in some places, not because he sends the aircraft on its way to the advantage of prior lienors, but because he has enhanced the value of the plane without knowing whether the person with whom he contracts has the title that

[99] See the excellent discussion in Connor, "Maritime Lien Priorities: Cross-Currents of Theory," 54 *Mich. L. Rev.* 777 at 816 (1956).

[100] (D.C. Wash. 1934) 6 F. Supp. 579.

[101] (9 Cir. 1935) 80 F. (2d) 804.

he purports to have. The common law time-right priority concept, however, has received only slightly more deference. In the main, contests have been between different classes of liens, with the time of accrual of only subordinate interest.

Priority by class is obviously unsettled. One treatise suggests that the following order of priority should be followed: (1) government liens; (2) storage liens; (3) repairmen's liens; (4) mortgagee or conditional seller interests.[102] For the reasons already indicated, the author cannot subscribe to the seniority granted the government lien, nor does it appear that there is substantial basis for differentiating the storage and repair lien. If called upon to suggest a system of priority that appears best to represent existing authority, the author would rank the liens as follows: (1) court costs; (2) storage, materialmen's and repairmen's liens; (3) recorded security interests; (4) government tax and penalty liens; (5) unrecorded security interests. As between two liens of the same class, priority would be determined upon a common law time-right basis. Whether this suggested schedule actually represents a reconciliation of authority, or only wishful thinking, is a nice question. It may perhaps more candidly be said that the authorities are presently so few that no accurate picture may be drawn of their state and tendency.

All that remains, then, is the recommendation for revision of Section 503 of the Civil Aeronautics Act, to establish a system of priority between the repairman and the antecedent recording security-holder. Further definition of this, the most common dispute between aircraft claimants, is deemed essential to full implementation of the federal recording system. The author feels that the advantages of the suggested change outweigh the disadvantages. It is hoped that aviation law practitioners with considerably greater knowledge of the practical problems involved than the author, will find the opportunity to examine this suggestion and press or reject it, as sound consideration dictates.

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[102] *Dykstra and Dykstra, The Business Law of Aviation* 477 (1946).